UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| CHRISTOPHER HUDSON, in his individual capacity on behalf of himself and others similarly situated,<br><br>Plaintiff,<br><br>-against-<br><br>NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNSEL, NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, RETIREMENT BOARD OF THE BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN, KATHERINE "KATIE" BLACKBURN, RICHARD "DICK" CASS, TED PHILLIPS, SAMUEL MCCULLUM, ROBERT SMITH, AND JEFFREY VAN NOTE,<br><br>Defendants. | No. 1:18-cv-4483 (RWS) |

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION'S MOTION TO DISMISS**

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**TABLE OF CONTENTS**

**Page**

# TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes**

## PRELIMINARY STATEMENT

Plaintiff, Christopher Hudson, is a participant in an ERISA benefits plan providing disability benefits to former professional football players. Hudson petitioned for and began receiving disability benefits. He later learned additional information about his disability and petitioned for reclassification to a more generous level of benefits. The board administering the plan denied that petition for failure to show changed circumstances, a showing required by the plan to justify additional benefits. Hudson believes that he was never told the standard for showing changed circumstances, in violation of ERISA (Counts I & II). Hudson has now sued the board, its individual members, and the employers and union that collectively bargained the benefits plan. The claims against the union should be dismissed for failure to state a claim on which relief can be granted.

Defendant National Football League Players Association ("Players Association") is the union that collectively bargained the plan with Defendant National Football League Management Council, the representative of the NFL's various employers. Because the plan is a collectively bargained, jointly administered multiemployer plan, the Players Association appoints half of the members of the board that administers the plan. Hudson alleges that the Players Association breached its fiduciary duty "to properly monitor [its] appointees" to ensure that they were not breaching their fiduciary duties under ERISA (Count III). Compl. ¶ 95. Hudson has also sued all defendants, including the Players Association, seeking a declaratory judgment that an amendment made to a *different* plan does not apply to him (Count IV), and that a limitations provision in the plan cannot be applied to block his claims (Count V). Each claim fails.

Fiduciary duties under ERISA are limited. The Players Association does not owe the duties Hudson alleges and accordingly he has failed to state a claim. "A person is only subject to [ERISA's] fiduciary duties 'to the extent' that the person" exercises or has "'discretionary

authority.'" *In re Citigroup ERISA Litig.*, 662 F.3d 128, 135 (2d Cir. 2011) (quoting 29 U.S.C. § 1002(21)(A)). The Players Association does not have discretionary authority over the issues about which Hudson complains—such discretion is vested with the board, and the Players Association's circumscribed powers to collectively bargain the plan and appoint some members to the board do not change that. The Second Circuit has never recognized a duty-to-monitor under ERISA, and the special circumstances of a collectively bargained plan counsel against recognizing such a duty here.

Even if the Players Association had a duty to monitor, Hudson has not alleged any facts to support his claim. Hudson does not allege that the Players Association's appointees were unqualified, or even that the Players Association failed to monitor them. Rather, his allegations are pure conclusions: the board breached its duties, and therefore the Players Association failed to monitor it. Such conclusory allegations should not provide carte blanche to sue unions (and employers) for failure to monitor every time an underlying fiduciary breach is pled. Hudson must have facts, not just conclusions.

Hudson's final two claims are derivative and just as lacking. Hudson's Count IV seeks an advisory ruling from this Court that an amendment made to a different benefits plan does not apply to him. Hudson has not alleged that the Players Association is a fiduciary with respect to that decision, and in any event, he lacks standing to challenge that amendment here. Hudson's Count V, which alleges that a limitations provision in the plan is ambiguous and, under one alleged interpretation, might be applied to limit his claims, fails for similar reasons.

All of Hudson's claims against the Players Association should be dismissed.

## STATEMENT OF FACTS

### I. The Defendants

The National Football League Players Association is the labor organization representing the professional football players in the National Football League. Compl. ¶ 12. The Players Association is a union and the exclusive collective bargaining representative of all present and future NFL players.

The National Football League Management Council ("Management Council") is a non-profit association of NFL clubs. Compl. ¶ 11. There are 32 separately owned and operated professional football franchises, and the Management Council is the exclusive bargaining representative of all present and future employer member franchises of the NFL.

The Bert Bell/Pete Rozelle NFL Player Retirement Plan (the "Plan") was created through collective bargaining between the Players Association and the Management Council. 2009 Plan Document ("Plan") at 1.[1] It "differ[s] from the typical employer sponsored and administered plan in that [it was] established through collective bargaining between the employees and employers." *Courson v. Bert Bell NFL Player Ret. Plan*, 75 F. Supp. 2d 424, 431 (W.D. Pa. 1999). It is a jointly administered, multiemployer, labor management trust fund established and maintained under various collective bargaining agreements in accordance with Sections 302(c)(5) and (c)(6) of the Labor Management Relations Act of 1947 (the "LMRA").

[1] A copy of the Plan document is attached to the Retirement Board's motion to dismiss as Exhibit A. *See* Dkt. 56 (Ex. A to the Declaration of Michael L. Junk). In "the ERISA context, 'because the Plan is directly referenced in the complaint and is the basis of this action, the Court may consider the Plan in deciding the motion to dismiss.'" *Cent. States, Se. & Sw. Area Health, & Welfare Fund v. Gerber Life Ins. Co.*, 984 F. Supp. 2d 246, 249 (S.D.N.Y. 2013). Hudson references the 2009 Plan document throughout his complaint and he alleges that it governs his claims. *E.g.*, Compl. ¶ 21 ("The relevant written instrument of the Plan within the meaning of ERISA § 402(a) is the Bert Bell/Pete Rozelle NFL Player Retirement Plan Amended and Restated as of April 1, 2009.").

The Retirement Board of the Bert Bell/Pete Rozelle NFL Player Retirement Plan (the "Retirement Board") is the Plan administrator and the Plan's named fiduciary. Compl. ¶ 13. The Retirement Board is "responsible for implementing and administering the Plan, subject to the terms of the Plan and Trust," and has "full and absolute discretion, authority and power to interpret, control, implement, and manage the Plan and the Trust." Plan at 30. The Retirement Board has six voting members. Compl. ¶ 13. Because the Plan is a trust fund established under the LMRA, "employees and employers [must be] equally represented in the administration of such fund" (29 U.S.C. § 186(c)(5)(B)), and accordingly, the Players Association and the Management Council each appoint three voting members (Compl. ¶ 13). Six individuals who serve as voting members of the Retirement Board have also been named as defendants.[2] Compl. ¶¶ 14–19.

## II. The Plan

The Plan provides retirement, disability, and related benefits to eligible professional football players.[3] Compl. ¶ 21. As relevant here, the Plan provides multiple categories of disability benefits (termed "total and permanent disability benefits"), two of which bear on Hudson's claims: (i) a "Football Degenerative" category for players whose disability arises out of NFL-football activities and results in total and permanent disability within 15 years of the player's last credited season (Compl. ¶ 25), and (ii) an "Inactive" category for benefit-eligible retired players whose disability arises from non-NFL-football activities or arises out of NFL-football activities more than 15 years after the player's last credited season (Compl. ¶ 23).

[2] The complaint consistently describes the members of the Retirement Board as members "on the Retirement Board of Directors" (Compl. ¶¶ 14–19), but the members of the Retirement Board do not have the title "director" nor is the Retirement Board itself a board of directors.

[3] Although Hudson's complaint at times refers to the Plan as an "ESOP," an undefined term that presumably stands for employee stock ownership plan (Compl. ¶ 13), the Plan is not an ESOP.

Football Degenerative category benefits have been greater than Inactive category benefits. Compl. ¶ 25.

## III. The Players Association's Alleged Fiduciary Status and Duties

"ERISA provides for both named and de facto fiduciaries." *In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 763 F. Supp. 2d 423, 565 (S.D.N.Y. 2011). Hudson does not allege that the Players Association is a named fiduciary, i.e., a fiduciary named in the Plan document "that possess[es] the 'authority to control and manage the operation and administration of the Plan.'" *Id.* (quoting ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1)). Rather, Hudson alleges that the Players Association is a de facto fiduciary, i.e., "a fiduciary to the extent that [it] 'exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,' or 'has any discretionary authority or discretionary responsibility in the administration of such plan.'" *Id.* (quoting ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A)).

Thus, Hudson alleges that the Players Association is a fiduciary "to the extent" it has the power to appoint and remove three of the six voting members of the Retirement Board. 29 U.S.C. § 1002(21)(A)); Compl. ¶ 12.[4] According to Hudson, it therefore "has an obligation to undertake an appropriate investigation that the fiduciary [it appoints] is qualified to serve in the position as fiduciary and at reasonable intervals to ensure that the fiduciary who has been

[4] Hudson alleges that the Players Association can remove and appoint replacements for the Management Council's appointees, but this appears to be a typographical error. Compl. ¶ 12. The Plan document says that "The NFLPA and the Management Council will have the authority to remove and appoint a replacement for any member on the Retirement Board either has *respectively appointed*." Plan at 30 (emphasis added). And Hudson's allegations elsewhere in the complaint reflect this. Compl. ¶ 93 (alleging that the Management Council and Players Association may "remove and appoint a replacement for any member of the Retirement Board that they had appointed").

appointed remains qualified to act as fiduciary and is acting in compliance with the terms of the Plan and in accordance with ERISA." Compl. ¶ 91.

Nevertheless, despite alleging only that the Players Association's power extends to appointment and removal of three voting members of the Retirement Board, Hudson alleges that the Players Association's duties are broader than its powers. Hudson alleges that the Players Association "had the fiduciary responsibility to monitor the Retirement Board *as an entity* … and *remedy any fiduciary violations committed by the Retirement Board*." Compl. ¶ 12 (emphasis added). Even though the Players Association has no power (alleged or otherwise) to require the Retirement Board to act, Hudson alleges that the Players Association had a duty to "require the Board" to take certain steps, including "revis[ing] the SPD," "disclos[ing]" interpretations of Plan terms, "utiliz[ing] [certain] definitions" of Plan terms, and "review[ing] and reevaluat[ing]" prior claims for reclassification. Compl. ¶ 94. Even though the Players Association has no power (alleged or otherwise) to amend the Summary Plan Description, Hudson alleges that the Players Association had a duty to "remove [certain] language in the SPD." Compl. ¶ 94. These allegations mirror the breaches Hudson alleges against the Retirement Board and its members. *E.g.*, Compl. ¶¶ 70–80, 84–88.

## IV. Hudson and His Claims

Hudson is a participant in the Plan. Compl. ¶ 1. In 2010, he petitioned for benefits, and in 2011, the Retirement Board determined that he was eligible for Inactive benefits under the Plan, but not Football Degenerative benefits. Compl. ¶¶ 32–33. In late 2014, Hudson petitioned again for Football Degenerative benefits, believing that he could meet the Plan's requirement of "clear and convincing evidence" of "changed circumstances" based on a subsequent Social Security Administration determination and a medical questionnaire. Compl. ¶¶ 34–35. A committee of the Retirement Board denied Hudson's petition, and the Retirement Board denied

Hudson's appeal, "finding that Hudson failed to meet its 'changed circumstances' requirement." Compl. ¶ 38. He later sued in federal court, but agreed to a voluntary remand. Compl. ¶ 40.

Hudson now seeks to certify a class of "hundreds, if not thousands" of Plan participants who sought disability benefits under the Plan. Compl. ¶¶ 52–54. The gravamen of Hudson's claims is an allegation that the Retirement Board violated ERISA when it failed to explain sufficiently the meaning of "clear and convincing evidence" and "changed circumstances." Compl. ¶¶ 67–88 (Counts I & II). Hudson also seeks to hold the Players Association and Management Council liable insofar as they "fail[ed] to properly monitor" their respective appointees to the Retirement Board. Compl. ¶¶ 89–95 (Count III). And finally, Hudson has sued all defendants on two final, derivative claims: he challenges to a 2017 amendment to a different plan (Compl. ¶¶ 96–101 (Count IV)), and a Plan provision regarding the limitations period (Compl. ¶¶ 102–112 (Count V)).

## ARGUMENT

### I. Hudson has failed to plead a duty-to-monitor claim (Count III).

#### A. The Players Association has no duty to monitor the Retirement Board.

Unlike most benefit plans, which are created and sponsored by a single employer, the Plan is a jointly administered multiemployer plan created through collective bargaining. Because the Plan is collectively bargained, the Players Association cannot unilaterally alter the Plan or otherwise exercise discretion over the Plan's administration or management. That "full and absolute discretion" lies solely with the Retirement Board. Plan at 30; *see also* Compl. ¶ 13 (alleging that the Retirement Board is "the designated Plan Administrator" and "named fiduciary"). Because the Players Association does not exercise discretion over the Plan's "management … [or] administration" (29 U.S.C. § 1002(21)(A)), it cannot be a fiduciary under ERISA and thus has no fiduciary duty to remedy the Retirement Board's alleged breaches or to

monitor the Retirement Board. The Second Circuit has never recognized a fiduciary duty under ERISA to monitor appointees—in any circumstance—and the Court should not do so here, where the Plan is a jointly administered, collectively bargained multiemployer plan.

Hudson must show, for each act he alleges that the Players Association should have taken, that the Players Association had the discretionary authority to take that act. "A person is only subject to [ERISA's] fiduciary duties 'to the extent' that the person" exercises or has "'discretionary authority.'" *In re Citigroup ERISA Litig.*, 662 F.3d at 135 (quoting 29 U.S.C. § 1002(21)(A)); *F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1259 (2d Cir. 1987) ("Under this definition [in § 1002(21)(A)], a person may be an ERISA fiduciary with respect to certain matters but not others, for he has that status only 'to the extent' that he has or exercises the described authority or responsibility."). Thus, "a person may be an ERISA fiduciary with respect to certain matters but not others" and in ERISA suits, "the 'threshold question' is whether the defendants were acting as fiduciaries 'when taking the action subject to complaint.'" *Id.* (quoting *Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co.,* 302 F.3d 18, 28 (2d Cir. 2002) and *Pegram v. Herdrich,* 530 U.S. 211, 226 (2000)). Where a party "has no authority to [act], it cannot be held liable for failing to take that action." *In re Bear Stearns*, 763 F. Supp. 2d at 566.

The Players Association's fiduciary status "can be determined as a matter of law at the motion to dismiss stage" (*In re Bear Stearns*, 763 F. Supp. 2d at 565), and it is not a fiduciary. The Players Association does not have the power or obligation to remedy the Retirement Board's breaches, and it also has no fiduciary duty to monitor its appointees.

**1. The Players Association has no duty to remedy the Retirement Board's alleged breaches.**

Nearly all of Hudson's allegations concern the Players Association's alleged failures with respect to the "Retirement Board *as an entity*." Compl. ¶ 12 (emphasis added); *see also id.* (alleging a "fiduciary responsibility to … remedy any fiduciary violations committed by the Retirement Board"). Yet the Players Association has no discretionary authority over the Retirement Board "as an entity" (*id.*) and thus cannot be held liable for failing to prevent or correct the Retirement Board's alleged breaches. Hudson faults the Players Association for not "requir[ing] the Board" to take certain steps (Compl. ¶ 94), but the Players Association does not have that authority and Hudson does not allege otherwise. Hudson also faults the Players Association for not itself "remov[ing] language in the SPD" (Compl. ¶ 94), but the Players Association does not have that authority either. The Players Association is not a fiduciary with respect to these matters, and to that extent, Hudson's claim must be dismissed.

Hudson asserts that the Players Association is a fiduciary because "when acting jointly with the Management Council [it] ha[s] the power to amend the Plan" (Compl. ¶ 12) and because it appoints "three" of the "six voting members" of the Retirement Board. Compl. ¶ 13. Neither of these powers gives the Players Association control over the Retirement Board as an entity or empowers the Players Association to alter the Summary Plan Description. Hudson never alleges that the Players Association itself manages or administers the Plan. Hudson's allegations cannot support the breadth of his claim.

First, Hudson alleges that "the NFL Players Association when acting jointly with [the] Management Council had the power to amend the Plan," but he never connects this alleged authority to any of the alleged breaches, and it could not provide a basis for liability anyway. None of the things Hudson alleges the Players Association "should have done" involved

amending the Plan. Compl. ¶ 94. In any event, it is well-settled that there is no general fiduciary duty to amend a plan. *E.g.*, *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999) (holding that the "act of amending … does not constitute the action of a fiduciary"); *Lockheed Corp. v. Spink*, 517 U.S. 882, 891 (1996) ("[T]he act of amending a pension plan does not trigger ERISA's fiduciary provisions."); *Janese v. Fay*, 692 F.3d 221, 227 (2d Cir. 2012) (applying *Hughes Aircraft* to conclude that trustees of a multiemployer plan "were not acting as fiduciaries when they amended the plans").

More specifically, as a rule, the Players Association's power to negotiate the terms of the Plan through collective bargaining cannot make it an ERISA fiduciary. Hudson acknowledges that the plan can be amended only when the Players Association is "acting *jointly* with the Management Council," i.e., through collective bargaining. Compl. ¶ 12 (emphasis added); Plan 1 at 36 ("**10.2 Bargaining Parties.** The NFLPA and the Management Council, when acting jointly, may amend this Plan in any respect and may terminate this Plan."). The collective bargaining of Plan terms is beyond ERISA's purview and is not a fiduciary act. The process of negotiation is one of "compromise and economic pressure," where a union must negotiate with employers while fairly representing all its members, not merely the subset of members who participate in certain benefit plans. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 336 (1981). The standards governing collective bargaining are "wholly inconsistent" and "totally alien" to an ERISA fiduciary's obligation. *Id.* at 336–37. "[I]mpos[ing] fiduciary status on union negotiators would unreasonably cramp legitimate negotiations, presumably forcing negotiators to arbitrarily favor a single group of employees." *United Indep. Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1262, 1267 (7th Cir. 1985). And unions are thus not ERISA fiduciaries by virtue of their ability to collectively bargain plan terms. *Id.*; *see also Maldonado v. Columbia*

*Presbyterian Med. Ctr.*, 1990 WL 17635, at *5 (S.D.N.Y. Feb. 21, 1990) ("[A] union engaged in negotiating the terms and conditions of future benefits cannot be regarded as an ERISA fiduciary in respect of plans in place.").

Second, the Players Association's ability to appoint "three" of the Retirement Board's "six voting members" does not make it an ERISA fiduciary either. Compl. ¶ 13. The Players Association does not appoint a majority of the Retirement Board, and thus cannot exercise "discretion[]" over the "administration of the plan." 29 U.S.C. § 1002(21)(A). "It is not enough to argue, as plaintiff has done, that the union is a fiduciary … because it elected three of its members to the six-member [Board]." *Breaux v. Pipefitters Local Union 195*, 807 F. Supp. 42, 45 (E.D. Tex. 1992). As explained further below (*infra* at 13–16), Hudson's complaint does not contain any allegations specific to the Retirement Board members appointed by the Players Association. Nor does the complaint allege that a minority of the Retirement Board could have acted to prevent the alleged harms. Indeed, the Second Circuit has expressed doubt that *even union appointees themselves* were fiduciaries where the relevant "discretion" was "reserve[d] … to a majority of the trustees." *Alfarone v. Bernie Wolff Const. Corp.*, 788 F.2d 76, 79 n.1 (2d Cir. 1986).

The Players Association's appointees to the Retirement Board are not its agents. The unique structure of the Retirement Board is dictated by the Labor Management Relations Act, and although the LMRA "requires an equal balance between trustees appointed by the union and those appointed by the employer, nothing in [it] reveals any congressional intent that a trustee should or may administer a trust fund in the interest of the party that appointed him, or that an employer [or union] may direct or supervise the decisions of a trustee he has appointed." *Amax Coal Co.*, 453 U.S. at 330. Similarly, ERISA "funds are [not] agents of … unions and [are not]

controlled by … unions." *Sciss v. Metal Polishers Union Local 8A*, 562 F. Supp. 293, 294–95 (S.D.N.Y. 1983) (citing *Amax Coal Co.*, 453 U.S. at 331–32).

Finally, nothing in the Plan otherwise gives discretion to the Players Association. Indeed, "[t]he Plan documents in no way give the Union any discretionary authority or control to manage, administer, or interpret the Plan, or to manage or dispose of the Plan's assets." *Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090, 1101 (9th Cir. 2004) (finding that a union was not a fiduciary). Ultimate fiduciary responsibility lies with the Retirement Board only. *Cf. In re Bear Stearns*, 763 F. Supp. 2d at 569 ("In this Circuit, an employer cannot be a de facto plan administrator where it has named an administrator."); *Maldonado*, 1990 WL 17635, at *5 (holding that a union was not an ERISA fiduciary and that "the Fund is the sole fiduciary of the plan negotiated between the Union and the [Employer]").

In sum, the Players Association has neither the power nor the duty to remedy the Retirement Board's alleged breaches.

**2. The Players Association has no duty to monitor.**

The Players Association has no fiduciary duty to monitor its appointees. Hudson alleges that the Players Association may appoint three voting members of the six-voting-member Retirement Board. This appointment power, Hudson alleges, creates a duty "to undertake an appropriate investigation that the fiduciary is qualified to serve … and at reasonable intervals to ensure that the fiduciary who has been appointed remains qualified … and is acting in compliance" with the Plan and ERISA. Compl. ¶ 92. But "[t]he text of ERISA does not explicitly impose a duty to monitor on plan fiduciaries" and "the Second Circuit has not spoken on this issue." *E.g.*, *In re Bank of Am. Corp. Sec., Derivative, & Empl. Ret. Income Sec. Act (ERISA) Litig.*, 756 F. Supp. 2d 330, 359 (S.D.N.Y. 2010). In any event, this duty applies only to "those who are already ERISA fiduciaries" (and thus delegating their own fiduciary authority),

and as explained above, the Players Association is not a fiduciary. *In re WorldCom, Inc.*, 263 F. Supp. 2d 745, 760–61 (S.D.N.Y. 2003) (rejecting the argument that "WorldCom's directors were the individuals who held the authority to appoint and remove Plan fiduciaries, and are therefore, themselves fiduciaries"); *see also Beauchem v. Rockford Prod. Corp.*, No. 01 C 50134, 2003 WL 1562561, at *1 (N.D. Ill. Mar. 24, 2003) (holding that an employer was not a fiduciary because "[n]othing requires or allows [the employer] control over the Plan Committee beyond appointing its members").

Even assuming the Players Association has such a duty, Hudson has not alleged facts sufficient to state a plausible claim.

**B. Hudson's allegations lack sufficient facts to render them plausible.**

Hudson does not allege a plausible breach of the duty to monitor. He never alleges that the Players Association does not monitor its appointees. He never alleges facts suggesting that the Players Association had notice of potential misconduct by its appointees. The sum of his allegations is that the Players Association "should have known" of the Retirement Board's misconduct, and had it known, it would have "take[n] appropriate action" by "remov[ing] and replac[ing]" its appointees. Compl. ¶¶ 93–95. The Court should not credit such conclusory allegations, and the duty-to-monitor claim should be dismissed.

In deciding a motion to dismiss a complaint for failure to state a claim pursuant to Federal Rules of Civil Procedure 8(a) and 12(b)(6), the Court accepts as true the non-conclusory factual allegations in the complaint. *See Roth v. Jennings*, 489 F.3d 499, 501 (2d Cir. 2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662 (2009). But "[i]n assessing the sufficiency of a pleading, a court must disregard legal conclusions, which are not entitled to the presumption of truth." *In re: Sunedison, Inc. ERISA Litig.*, 2018 WL 3733946, at *3 (S.D.N.Y. Aug. 6, 2018). "A pleading that offers labels and conclusions or a formulaic recitation of elements of a cause of action will

not do." *Iqbal*, 556 U.S. at 678 (internal quotation marks and citation omitted). Dismissal of a complaint or cause of action for failure to state a claim is appropriate where the complaint fails to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Rather, to survive a motion to dismiss, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Id.* The complaint must "possess enough heft to 'sho[w] that the pleader is entitled to relief'" by providing factual allegations "plausibly suggesting (not merely consistent with)" the required elements of the asserted cause of action. *Id.* at 557.

Hudson does not allege or plead any facts suggesting that the Players Association appointed unqualified individuals to the Retirement Board. *In re Lehman Bros. Sec. & ERISA Litig.*, 2011 WL 4632885, at *7 (S.D.N.Y. Oct. 5, 2011), *aff'd sub nom., Rinehart v. Akers*, 722 F.3d 137 (2d Cir. 2013), *cert. granted, judgment vacated*, 134 S. Ct. 2900 (2014) (dismissing a "duty to appoint" claim as "unsupported" and "not even squarely claim[ing] that [defendants] actually did appoint unqualified plan fiduciaries").

Similarly, Hudson "does not allege facts about [the Players Association's] actual monitoring process and its specific shortcomings." *Nicolas v. Trustees of Princeton Univ.*, 2017 WL 4455897, at *5 (D.N.J. Sept. 25, 2017) (dismissing a duty-to-monitor claim). Without facts "showing how the monitoring process was deficient," Hudson cannot "state a plausible claim." *White v. Chevron Corp.*, 2016 WL 4502808, at *19 (N.D. Cal. Aug. 29, 2016) (dismissing a duty-to-monitor claim).

Indeed, all Hudson has pled is a conclusory allegation that "the NFL Players Association knew or in the exercise of reasonable diligence, should have known" of the Retirement Board's alleged breaches:

> 93. The NFL Management Council and the NFL Players Association knew or in the exercise of reasonable diligence, should have known that the (a) SPDs did not set forth an explanation of what constituted "clear and convincing evidence" or "changed circumstances," (b) the Board Defendants had interpreted "clear and convincing evidence" or "changed circumstances," (c) the interpretation of "clear and convincing evidence" or "changed circumstances," utilized by the Board Defendants was not the meaning of those terms and phrases as would be understood by the average participant in this Plan, (d) the Board Defendants did not disclose the meaning of those terms and phrases to participants until after their initial classification had been determined or until the participant sought reclassification (sometimes not until the final internal appeal), (e) the SPDs discouraged participants from hiring an attorney to advise them in connection with their initial claim for benefits, and (f) given the Board Defendants' interpretation and application of the phrases, "clear and convincing evidence" or "changed circumstances," participants would be harmed by applying for benefits before all the information and evidence was available to establish their proper classification.

Compl. ¶ 93. Hudson's complaint is "without any allegation as to how [the Players Association] knew or should have known of" the alleged breaches. *Burgis v. New York City Dep't of Sanitation*, 798 F.3d 63, 70 n.10 (2d Cir. 2015). This "[t]hreadbare recital[] of the elements of a cause of action, supported by mere conclusory statements, do[es] not suffice" to state a claim. *Iqbal*, 556 U.S. at 678.

It is telling that Hudson's complaint is replete with group pleading and fails to distinguish between Defendants. Hudson alleges that "[t]he NFL Management Council and the NFL Players Association knew or … should have known" of the alleged breaches, and never pleads any allegation specific to either's purported failure to monitor. Compl. ¶ 93. These allegations concerning state of mind "are entirely conclusory and not specific to any Defendant" and should not be credited. *Kinra v. Chicago Bridge & Iron Co.*, 2018 WL 2371030, at *6 (S.D.N.Y. May 24, 2018).

This lack of specificity poses special problems for Hudson's failure-to-monitor claim. The Players Association does not have a duty to monitor the Retirement Board; at most, it has a duty to monitor its appointees, and Hudson has levied no particularized allegations against them. Indeed, Hudson has no allegations regarding the conduct of any individual member of the Retirement Board—each individual member "is described in a single paragraph by job title and relationship to the Plan, and is never mentioned again." *Kinra*, 2018 WL 2371030, at *6; Compl. ¶¶ 14–19.

Hudson's failure-to-monitor claim boils down to the allegation that the Retirement Board breached its duties, and therefore, the Players Association must have failed to monitor its three appointees. Hudson has at most lodged allegations "that are 'merely consistent with' a defendant's liability," which "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). Hudson's duty-to-monitor claim should be dismissed.

### C. If Hudson fails to plead a claim against the Retirement Board, his claims against the Players Association must fail too.

If this Court dismisses the underlying claims against the Retirement Board, Hudson cannot state a claim against the Players Association. As this Court and others have held, "[a] claim for breach of the duty to monitor requires an antecedent breach to be viable," and "[w]ith no antecedent breach by the monitored parties in this case, …. [the] duty to monitor claim fails." *In re Bear Stearns*, 763 F. Supp. 2d at 580. For this reason, the Players Association joins the arguments set forth in the Retirement Board's motion to dismiss, including its arguments that the statute of limitations has run on Hudson's claims.

## II. Hudson has failed to plead a ERISA Section 502(a)(3) claim (Count IV).

Hudson has failed to state a claim under ERISA § 502(a)(3). Hudson's allegations are incomplete and confusing, but his allegations appear to concern an amendment made to a different and separate benefit plan for NFL players (the NFL Player Disability & Neurocognitive Benefit Plan). Compl. ¶¶ 50–51.

*First*, as a threshold matter, Hudson has not stated a claim against the Players Association because he has not alleged that the Players Association is a fiduciary "with respect to … the action subject to complaint." *In re Citigroup ERISA Litig.*, 662 F.3d at 135. He never alleges that the Players Association made the 2017 Amendment or decided to apply it retroactively to him. Indeed, his allegations never even mention the Players Association. *E.g.*, Compl. ¶¶ 47–51.

*Second*, Hudson lacks standing to bring the claim because he has not alleged any injury. "A plan participant suing under ERISA must establish both statutory standing and constitutional standing, meaning the plan participant must identify a statutory endorsement of the action and assert a constitutionally sufficient injury arising from the breach of a statutorily imposed duty." *Kendall v. Empl. Ret. Plan of Avon Prod.*, 561 F.3d 112, 118 (2d Cir. 2009). Hudson has not alleged that the 2017 Amendment was made to the Plan here, or that the 2017 Amendment has been applied retroactively to his vested benefits. Hudson's own allegations acknowledge that the Retirement Board has never indicated that any such amendment would apply to his benefits under the Plan. Compl. ¶ 51 ("The Retirement Board did not respond to Hudson's question about whether the Board intended to have the 2017 Amendment to the NFL Player Disability & Neurocognitive Benefit Plan apply to Hudson's claim for benefits."). And he admits that his claim "does not seek a determination of Plaintiff's rights or benefit under the terms of the Plan."

Compl. ¶ 98. Without an allegation that he has been injured by a deprivation of vested benefits, Hudson has no standing.

Hudson's Count IV should be dismissed.

## III. Hudson has failed to plead a claim under ERISA § 410(a) or ERISA § 404(a)(1)(A) and (B) (Count V).

Hudson has failed to state a claim with respect to the Plan's limitations provision. Hudson's Count V alleges that a provision of the Plan concerning the limitations period is ambiguous and *might* be interpreted as establishing a limitations period shorter than ERISA's. Compl. ¶¶ 102–112. Hudson asserts that either (1) the provision conflicts with ERISA's limitations period and is "void as against public policy" under ERISA § 410(a) because it "purports to relieve a fiduciary from responsibility or liability" imposed by ERISA or (2) that the provision does not conflict with ERISA's and "Defendants breached their fiduciary duties under ERISA" because "the meaning of such a provision was not sufficiently disclosed in the SPD." Compl. ¶¶ 110–111. In either alternative, Hudson has failed to state a claim.

For either variation of his claim, Hudson has not alleged facts sufficient to confer standing. Hudson "must allege some injury or deprivation of a specific right that arose from a violation of [an ERISA] duty in order to meet the injury-in-fact requirement" of Article III standing. *Kendall*, 561 F.3d at 121. Hudson has not alleged any injury to himself arising out of the Plan's limitation provision. *See Trustees of Upstate New York Eng'rs Pension Fund v. Ivy Asset Mgmt.*, 843 F.3d 561, 569 (2d Cir. 2016) ("[A] breach of fiduciary duty under ERISA in and of itself does not 'constitute an injury-in-fact sufficient for constitutional standing.'" (quoting *Kendall*, 561 F.3d at 121)).

With respect to Hudson's ERISA § 410(a) claim, the Players Association is not a proper defendant. Hudson alleges that the Plan's limitation provision is ambiguous, but even assuming

the Retirement Board interpreted the provision to conflict with ERISA (something Hudson has not alleged), the Players Association would not be responsible for the Retirement Board's interpretation. *See* Plan at 30 ("The Retirement Board will have full and absolute discretion, authority and power to *interpret*, control, implement, and manage the Plan and the Trust." (emphasis added)). As explained *supra* at 9–12, the Players Association was not acting as an ERISA fiduciary when it negotiated the Plan's (allegedly ambiguous) terms during collective bargaining.

With respect to Hudson's disclosure claim, the Players Association does not have a fiduciary duty to "sufficiently disclos[e] [information] in the SPD." Compl. ¶ 111. As explained *supra* at 7–8, to state a claim for breach of fiduciary duty, Hudson must allege that the Players Association is a fiduciary "with respect to … the action subject to complaint." *In re Citigroup ERISA Litig.*, 662 F.3d at 135. Hudson never alleges that the Players Association has the power to write or alter the Summary Plan Description, and that defeats his claim. *In re Bear Stearns*, 763 F. Supp. 2d at 566 (explaining that where a party "has no authority to [act], it cannot be held liable for failing to take that action.").

Hudson's Count V should be dismissed.

## CONCLUSION

For the foregoing reasons, the Court should grant the Players Association's Motion to Dismiss.

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